APPEAL NO. 92132
FILED MAY 18, 1992

On March 9, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. (Hearing officer) determined that the claimant, the respondent, had not been certified properly, in accordance with the rules of the Texas Workers' Compensation Commission, as having achieved maximum medical improvement (MMI) and 0% impairment rating, on September 16, 1991. Specifically, the hearing officer found that the appellant did not bring forward evidence to show compliance by the treating doctor with Tex. W.C. Comm'n Rule, 28 TEX. ADMIN. CODE §130.2 (Rule 130.2). Another finding of fact noted that the treating physician failed to complete the TWCC-69 form, by omitting any information concerning narrative history of the medical condition. As a conclusion of law, the hearing officer found that there was "no evidence that MMI has been properly certified in accordance with the Texas Workers' Compensation Act and implementing rules."

The appellant asks that the decision be reviewed and reversed, and that respondent be found to have achieved MMI. The appellant complains that the hearing officer has incorrectly stated that the doctor's MMI report was not contained in the officially noticed claim file of the Commission, when it is clear that it was presented at least by the time of the benefit review conference and thus must have been included in the claim file by the time of the hearing. Second, the appellant notes that the respondent came to the hearing seeking only less than two weeks worth of temporary income benefits, but the hearing decision is unclear as to the extent of benefits to be paid.

DECISION

Finding no reversible error in the hearing officer's decision, we affirm.

The only matter in issue before the contested case hearing officer was whether temporary income benefits (TIBs) are owed to the respondent for the period after his treating physician certified MMI and assessed a 0% impairment rating. Although the record indicates that respondent may have received a bona fide job offer, and also that he was given a full release to work, neither the issue of bona fide job offer credit against TIBs nor the end of disability were raised as issues by appellant, and thus were not considered.

The appellant sustained an undisputed on-the-job injury, in the course and scope of his employment for (employer), through a fall at the work site on (date of injury). He sustained injury to his right shoulder, right arm, and face. The next day, the employer sent him to Dr. S, who took x-rays and conducted an examination and sent him back to light duty. Respondent testified he worked only light duty that day, then returned to Dr. S on July 13th, and was then taken off work. Dr. S's diagnosis was capsulitis of the right shoulder. Respondent continued to go to Dr. S through September, seeing him approximately every two-three weeks.

Medical reports on the form used by Dr. S's clinic were put into evidence by the respondent. These indicate that Dr. S prescribed therapy. A medical report dated August 19, 1991, indicates that respondent will be off work for two more weeks, and describes the condition as "resolving capsulitis." On September 11th, Dr. S's medical report describes the condition as "resolved capsulitis" and states that respondent can return to normal work by September 16, 1991.

The appellant put into evidence medical reports filed on forms of the Texas Workers' Compensation Commission that were completed by Dr. S, both dated September 20, 1991. One is the Specific and Subsequent Medical Report (TWCC-64), which is required to be completed pursuant to Rule 133.102. The other was the Report of Medical Evaluation (TWCC-69), which is the form prescribed in accordance with Rule 130.1 to certify the attainment of MMI and to evaluate impairment. The latter form notes that the respondent reached MMI on September 16th, and assigns a "0%" impairment. The report does not describe anything relating to the respondent's history or most recent clinical evaluation as required in Rule 130.1 and set forth on the form under item 13.

Respondent testified that Dr. S explained this to him, as well as the full release to work, on his last visit around September 16th. Although he testified that Dr. S also gave him copies of medical reports on his last visit, respondent also stated, when shown the TWCC-64 and TWCC-69, that he had not previously seen copies of those reports.

Respondent said he was dissatisfied with Dr. S's evaluation, because he was still in pain. He went to see Dr. K on November 5, 1991. Dr. K took him off work, treated him, and then released him to normal work duties effective December 9, 1991.

Respondent testified that, following the work release from Dr. S, he had been given a written offer to return to work by the employer. He stated that he received subsequent verbal confirmation from the employer that a job was being held open for him. However, he declined to return to work in response to either offer. Respondent may have returned to work after Dr. K's December 9th release; the record is not clear, but this fact may be inferred from respondent's statement at the beginning of the hearing that he was seeking only about 1-1/2 weeks worth of TIBs, the net amount due to him after allowing for an overpayment from the appellant of about three weeks of income benefits.

At the hearing, the hearing officer indicated that she wanted evidence to show whether Dr. S's report had been properly filed with the claimant and the Commission by the treating doctor as required by Rule 130.2. She also took official notice of the claims file of the Commission. Although appellant's attorney indicated that there was a document showing mailing of documents to the respondent, the record has not been favored with a copy. The manner in which Dr. S's reports were submitted by appellant (as Exhibits B-1 and B-2) as well as the fact that both were completed the same day, indicates that they may

have been stapled together. The report labelled B-1 is the TWCC-64, which is only required to be submitted to the carrier and the claimant, but not the Commission. *See* Rule 133.102.

The hearing officer recited in her decision that there was no TWCC-69 form in the "main" file as of March 9, 1992. However, appellant correctly points out that the medical report was at least on file with the Commission as of the date of the benefit review conference, which was January 30, 1992. While it may be that the document was not in the "main" file, we would note that the 1989 Act, and applicable rules, require filing with the Commission, and not to the Commission's "main" file. In any case, we believe that the issue of failure to timely file a report must be separated from whether the report constitutes a "certification."

In our opinion, the failure of a health care provider to timely submit required reports does not in and of itself cause the report to lose value or credibility as an expert opinion, or, in the case of a TWCC-69, to fail as a "certification" of MMI and/or an evaluation of impairment. The sanction against a health care provider for failure to submit a certification of MMI timely is found in Art. 8308-10.07(c)(3). Consequently, we disagree with the hearing officer's decision insofar as she indicates that the failure of the doctor to mail an MMI certification to parties or the Commission within 7 days negates the substantive effect of such report as a proper "certification."

However, we agree that her conclusion of law that MMI was not properly certified in this case is sustained by her fact finding that an important portion of the TWCC-69, which elicits information required by Rule 130.1, was left blank. The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-4.26 governs eligibility and payment of impairment income benefits. A treating physician whose patient has achieved MMI is required to certify his assessment in a report filed with the carrier, the injured employee and the Commission, and to provide any other information that the Commission may require. Art. 8308-4.26(d). The "requirements" of the Commission as to content of such a report have been set forth in Rule 130.1. That rule, in subsection (b), defines certification as the "formal assertion of medical facts or expert opinion by a doctor supporting or relating to: 1) whether an employee has or has not reached MMI; or 2) whether an employee has any impairment, and, if so, the employee's impairment rating." The Act requires impairment evaluations to be done using a specifically described version of the American Medical Association *Guides to the Evaluation of Permanent Impairment.* Art. 8308-4.24.

Rule 130.1 sets out information which, in the judgment of the Commission, is necessary both to evaluate compliance with the required use of the guidelines, and to show the facts underlying the medical evaluation which will demonstrate that the employee has reached the "point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability." See Art. 8308-1.03(32) [definition of "maximum medical improvement"].

Because the TWCC-69 in this case was not a proper certification of MMI under Rule 130.1, the findings regarding failure of compliance with Rule 130.2 are harmless error.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contest only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). In this case, the hearing officer's determination that the TWCC-69 report did not, as a matter of fact, contain the necessary requirements for documentation of the medical condition and a description of the results of the most recent clinical evaluation, as required under Rule 130.1, is supported by probative evidence from the face of the report itself.

We do not agree that the hearing officer's decision is vague. It states that "the claimant is entitled to temporary income benefits for the period of time during which he has not reached maximum medical improvement and he suffered a disability due to his compensable injury of (date of injury)." Thus, if the respondent returned to work at wages equivalent to those before the injury, after the release December 9, 1991, then disability, as defined in Art. 8308-1.03(16), may have ended. Because the appellant did not put disability (or bona fide job offer) into issue, the hearing officer did not make a specific finding one way or the other regarding disability. The order is, however, flexible enough to be accommodated to the facts not in issue.

For the foregoing reasons, we affirm the hearing officer's determination that a proper certification of MMI was not made, because medical data as required by Rule 130.1 was not provided.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge